

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0116
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DALE EDWARD CRANFORD,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20080459

Honorable Deborah Bernini, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt

Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Rebecca A. McLean

Tucson
Attorneys for Appellant

K E L L Y, Judge.

¶1 Appellant Dale Cranford was found guilty after a jury trial of possession of a dangerous drug and possession of drug paraphernalia. After sentencing him to a term of imprisonment at a hearing, the trial court ordered him to pay a fine and certain fees in chambers without Cranford or his attorney present. Cranford argues the fines and fees were an illegal sentence that must be vacated. Because Cranford has not met his burden to show fundamental error, we affirm.

Background

¶2 We view the evidence in the light most favorable to upholding the verdict. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). Cranford was arrested in January 2008. He had a small bag of methamphetamine, a metal pipe, a glass pipe, tweezers with what appeared to be drug residue, and some matches in various parts of his clothing. The state charged him with possession of a dangerous drug and possession of drug paraphernalia. After a jury trial, Cranford was convicted on both counts. The trial court imposed concurrent, mitigated prison terms the longer of which was 2.5 years. After the sentencing hearing, in chambers, the court also ordered Cranford to pay a \$2,000 fine with a \$1,680 surcharge, a \$20 time-payment fee, a \$25 indigent administrative assessment fee, and \$400 in attorney fees.

Discussion

¶3 Cranford contends his “sentence must be vacated and the case remanded” because the trial court imposed fines and fees in his absence. Because he did not object

to the court's action below, we review for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶4 As Cranford points out, Rule 26.9, Ariz. R. Crim. P., provides that criminal defendants must be present at sentencing. “A criminal defendant has the right to be physically present at every critical stage of a trial, including a sentencing hearing This right is grounded in the Sixth and Fourteenth Amendments of the United States Constitution, as well as article II, § 24 of the Arizona Constitution.” *State v. Forte*, 222 Ariz. 389, ¶ 7, 214 P.3d 1030, 1033 (App. 2009) (citations omitted). Thus, “the defendant must be present at his sentencing except in extraordinary circumstances.” *State v. Fettis*, 136 Ariz. 58, 59, 664 P.2d 208, 209 (1983).

¶5 The fine and surcharge were part of Cranford's sentence. *See State v. Payne*, 561 Ariz. Adv. Rep. 11, ¶ 31 (App. 2009) (A “fine is a criminal penalty that constitutes a sentence.”), *quoting State v. Marquez-Sosa*, 161 Ariz. 500, 503, 779 P.2d 815, 818 (App. 1989); *State v. Beltran*, 170 Ariz. 406, 408, 825 P.2d 27, 29 (App. 1992) (“Like a fine, which has been established as a criminal penalty, the surcharge on a fine is a criminal penalty.”) (citation omitted); *see also* A.R.S. § 13-801(A) (“A sentence to pay a fine for a felony shall be a sentence to pay an amount fixed by the court”); *State v. McKelvey*, 30 Ariz. 265, 268-69, 246 P. 550, 551 (1926). The fees ordered, in contrast, were not part of the sentence imposed. *See State v. Connolly*, 216 Ariz. 132, ¶ 3, 163 P.3d 1082, 1082-83 (App. 2007) (court-ordered attorney and indigent assessment fees not fines under A.R.S. § 12-116); *State v. Anderson*, 169 Ariz. 381, 382, 819 P.2d 967, 968

(App. 1991) (trial court not required to orally pronounce time payment fee at time of sentencing because “need for the assessment . . . arises only after sentencing when the court-ordered penalty, fine or sanction is not paid in full on the day that it is imposed”) (emphasis omitted), *vacated in part on other grounds*, 171 Ariz. 34, 827 P.2d 1129 (1992).

¶6 Thus, by imposing a fine and surcharge on Cranford in his absence when no “extraordinary circumstances” were present, the trial court did not comply with Rule 26.9. Cranford was entitled to be present when they were imposed. In order to correct its apparent oversight, the trial court was required to impose the fine and surcharge “in open court with the defendant present” and not by minute entry. *See State v. Powers*, 154 Ariz. 291, 295, 742 P.2d 792, 796 (1987). Even assuming this error by the trial court was fundamental, however, Cranford has not asserted or explained how he was prejudiced by his absence. *See Forte*, 222 Ariz. 389, ¶ 22, 214 P.3d at 1036. Because Cranford was present when the trial court imposed his prison sentences, “the ‘minimal requirements’ for sentencing [were] met.” *Id.* ¶ 21. “[T]he trial court . . . observed, questioned, listened to [Cranford] and his attorney, and advised [him] of his appellate and post-conviction rights.” *Id.* Additionally, the fine imposed was listed as a mandatory fine in Cranford’s presentence report and the surcharge was also calculated in the report, giving Cranford notice before the sentencing hearing that the fine was required. In sum, Cranford has not “met his burden of proving he is entitled to appellate relief.” *Id.* ¶ 22, *citing Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607-08.

Disposition

¶7

Cranford's convictions and sentences are affirmed.

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge